

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77 1318

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

Appellee

Docket No. 77-1318

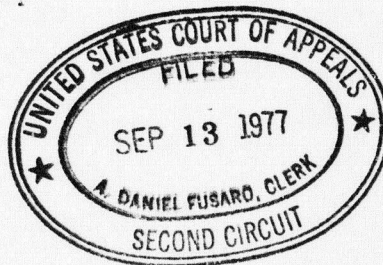
-against-

PETER JAKAKAS

Appellant

B
P/S

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BRIEF ON BEHALF OF APPELLANT
PETER JAKAKAS PURSUANT
TO ANDERS v. CALIFORNIA



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PRELIMINARY STATEMENT UNDER
SECOND CIRCUIT RULE 28

The judgment herein was rendered after a jury trial before United States District Judge Thomas C. Platt, in the United States District Court for the Eastern District of New York, which found the appellant, PETER JAKAKAS, guilty of Counts 1, 2, 3, and five of the indictment and not guilty of Count 4, and judgment of conviction was entered on July 22, 1977.

STATEMENT OF THE ISSUE

The sole issue in this case is whether there are any non-frivolous issues on appeal.

STATEMENT OF THE CASE

The appellant, PETER JAKAKAS was indicted with DENNIS T. BAKER on a five count indictment charging both in Count 1 with engaging in the business of dealing in explosive materials, to wit TNT, without having obtained a license pursuant to Title 18, United States Code, Sections 842 (a) (1) and (2), in Count 2 with engaging in the business of dealing in firearms and ammunition in violation of Title 18 United States Code Sections 922 (a) (1) and (2), in Count 3 with having conspired to deal in explosive materials, to wit TNT, without having obtained a license, in Count 4 with having conspired, together with VALERIE JAKAKAS, an unindicted co-conspirator, to engage in the business dealing in firearms and

ammunition without being so licensed and Count 5 charged PETER JAKAKAS with having stored explosive material, to wit TNT, in a manner not in conformity with the regulations promulgated by the Secretary of the Treasury, in violation of Title 18, United States Code, Sections 842 (j) and (2).

A suppression hearing as to an alleged confession of PETER JAKAKAS was held before Judge Platt on October 26 and 27th, 1976 and the alleged confession was suppressed.

The trial commenced after the selection of a jury on February 22, 1977. The first witness for the Government was DENNIS BAKER who testified that he had already entered a plea of guilty in the case on the promise that at the time of sentence, the sentencing judge would be informed of his cooperation with the Government. He stated that he knew the appellant PETER JAKAKAS for a year and a half to two years. In December, 1975, he said that JAKAKAS and his wife lived in a house on East 96th Street between Avenues M and N in Brooklyn, New York.

In June of 1975 he testified that JAKAKAS offered to sell him a quantity of black powder for \$6.00 and that the sale was made two weeks later. The black powder as well as some percussion caps was put in evidence.

In early July, 1975, he testified that JAKAKAS offered him plastic explosives but the witness wasn't interested. JAKAKAS said he could procure these plastic explosives from a friend.

In December, 1975, he said that JAKAKAS offered to sell him 7 1/2 pounds

of TNT, six rifle smoke grenades, two hand smoke grenades, two tear gas grenades and batteries for the TNT. On December 13th, BAKER said he obtained the materials from appellant and sold them to MICHAEL ZEZIMA, an agent of the Government, on December 14, 1975, for \$350.00, delivering \$325.00 to the appellant later in the day. JAKAKAS then offered to sell him 500 pounds of TNT as well as a .50 caliber machine gun, a .30 caliber machine gun, a burp gun and a Thompson sub-machine gun. The price of the .50 machine gun was \$900. This sale never took place.

In January, 1976, he testified that JAKAKAS offered him three hand guns. On January 10, 1976 the witness stated he had picked up one of the handguns a .38 revolver from appellant at appellant's home, together with fifty rounds of ammunition from VALERIE JAKAKAS and delivered it to agent ZEZIMA for \$100. with fifty rounds of ammunition returning to appellant's house and giving the \$100. to VALERIE JAKAKAS.

Before the sale of the gun, BAKER testified that the appellant stored in the witness's garage boxes of ammunition and machine gun clips for about a week. Further that JAKAKAS offered for sale 50 pounds of TNT and 50 pounds of dynamite but that nothing further transpired as to the sale of these items.

An extensive cross-examination was conducted of the witness BAKER by defense counsel directed to his credibility without effect.

MICHAEL ZEZIMA, Special Agent of the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department was called next by the Government.

He testified that acting in an undercover capacity he met DENNIS BAKER on December 12, 1975 and was offered for sale 15 half pound blocks of TNT, 6 rifle grenades, 4 smoke grenades and 10 military batteries. On December 14, 1975 he purchased these items from BAKER.

On this date BAKER offered him some machine guns and additional TNT. A price of \$900. was made for the .50 machine gun but the sale was never made.

On January 12, 1976 he testified that he drove BAKER to the corner of the block where appellant lived and BAKER left the car to return with the .38 in evidence and fifty rounds of .38 ammunition which he sold to the witness for \$125. On January 26, 1976 he said he went to a restaurant, with BAKER and observed him calling the telephone number of appellant relative to a possible sale of TNT.

Special Agent ROBERT PATTY of the Bureau of Alcohol, Tobacco and Firearms then testified that he conducted a surveillance of DENNIS BAKER on January 12th, 1976 and saw him leave 1524 East 96th Street, Brooklyn, the residence of the appellant, and then go to another car.

Special Agent ALAN THERRIEN of the Bureau of Alcohol, Tobacco and Firearms testified that he test fired the .38 pistol in the case and found it operable.

KENNETH SNOW, forensic chemist for the Bureau of Alcohol, Tobacco and Firearms testified that he analyzed the black powder and TNT in the case and found it to be as stated.

Special Agent ALLEN J. MacDONALD of the Bureau of Alcohol, Tobacco and

Firearms testified as to the chain of custody of the exhibits.

RALPH COOPER, explosives enforcement officer of the Bureau of Alcohol, Tobacco and Firearms testified as an expert as to the test firing of the TNT and as to the condition and type of the grenades.

A document of the Bureau of Alcohol, Tobacco and Firearms was read in evidence on consent stating that PETER JAKAKAS was not licensed by the Government to deal in explosives or firearms.

The Government rested.

THE DEFENSE CASE

Appellant PETER JAKAKAS did not testify in his own behalf.

MARTIN MANDELL, father-in-law of appellant testified that he was a licensed firearms dealer, presently in business in Scottsdale, Arizona, and formerly the proprietor of a gun store in Brooklyn. He stated that he never carried TNT in his store, nor did he carry the grenades in evidence as part of his stock, and that appellant couldn't have obtained the contraband which was sold from his store.

VALERIE JAKAKAS, wife of the appellant, testified as to the circumstance of the closing of her father's store in Brooklyn and that whatever was left in the store, she and her husband tried to dispose of. She stated that there were smoke grenades in the store but never any TNT or machine guns. She said DENNIS BAKER only came to their house once when she was alone and denied she had ever given him the pistol in the case.

The defense was an attack on the credibility of DENNIS BAKER.

Both sides then rested.

The jury then found appellant guilty on Counts 1, 2, 3, and 5 and not guilty on Count 4.

POSSIBLE ISSUES ON APPEAL

The principal issue in the case is one of fact. Did DENNIS BAKER, acting as an agent of appellant and a co-conspirator obtain the contraband from appellant and sell it to Agent ZEZIMA? The question of fact was resolved by the jury against appellant and the jury's verdict was amply supported by the evidence. There is no question as to the sufficiency of the evidence presented by the Government and no question of law arises from it. Therefore, there can be no possible issue on appeal in this phase of the case.

The only other possible issue on appeal is the introduction in evidence of the sale of the black powder and the smoke grenades with which the appellant was not charged in the indictment, having only been indicted for the sale of TNT and firearms. This is covered by Section 404 (b) of the Federal Rules of Evidence which allows the introduction of

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior to the enactment of Rule 404, the Second Circuit always had a

liberal rule in allowing the introduction of similar acts to show intent. In United States v. DeCicco, 435 F. 2d (2nd Cir) 1970 evidence of similar acts was held admissible to prove intent, where intent was one of the issues in the case. Intent in the instant case and a common course of conduct as planned are issues in the case. Whenever intent is an issue, such evidence would be admissible on the direct case of the prosecution. United States v. Cohen 489 F. 2d 945 (2d Cir) 1973; United States v. Brettholz 485 F. 2d 483 (2d Cir) 1973.

Under the Federal Rules of Evidence there has been little change in the rule except that it has been stressed that the evidence of similar offenses must be clear and convincing and similar in kind and reasonably close in time to the charge involved. United States v. Oliver, 525 F. 2d 731 (8th Cir) 1975, cert. denied 424 U.S. 973, 96 S. Ct. 1477, 47 L. Ed. 2d 743, 1976. The incident of the sale of the black powder and grenades were within a few weeks of the crimes charged and without doubt were clear and convincing.

However, the introduction of similar acts must always be accompanied by a limiting instruction of the Court to the jury. In the instant case, after the introduction of the first similar act, i.e. the sale of the black powder, Judge Platt charged the jury as follows on P.50 of the trial transcript:

THE COURT: Wait one second. Ladies and gentlemen, The Government is offering this evidence with respect to black powder to prove what we referred to as a prior similar act. It is their contention that the sale of black powder at that time was illegal and that they show the offering is as proof to show a common course of conduct as planned, design, knowledge, and intent on

the part of the defendant. I will give you full instructions at the conclusion of the case with respect to how you are to treat the proof with respect to the prior similar act. You may receive it for only limited purposes, I will explain that to you at the end of the case, but keep that in mind when considering the evidence. All right, Ms. Shepard.

At the conclusion of the trial, in his charge to the jury on pp.615-616 of the transcript, Judge Platt specifically charged the jury as to the law of similar acts. (app. pp. 22 and 23).

In the case of engaging in the sale of explosives and firearms the evidence of similar acts at the same time period was relevant.

There are no other questions which can be raised on appeal. There are no non-frivolous issues on which to appeal.

CONCLUSION

For the above stated reasons there are no non-frivolous issues which can be raised on appeal. Accordingly, it is respectfully requested that JOHN C. CORBETT be relieved as counsel on this appeal.

Respectfully submitted,

JOHN C. CORBETT
Attorney for appellant.

RECEIVED
U. S. ATTORNEY

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EAST. DIST. N. Y.

*Paul
J. [unclear]*

